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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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SEP 24 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LEVERAGED LAND CO., L.L.C., an)	2 CA-CV 2009-0057
Arizona limited liability company; and)	DEPARTMENT B
NORMAN MONTGOMERY and CHERYL)	
MONTGOMERY, husband and wife,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Plaintiffs/Appellants,)	Rule 28, Rules of Civil
)	Appellate Procedure
v.)	
)	
MICHAEL W. HODGES and DAVID H.)	
CAIN,)	
)	
Defendants/Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 2005-00270

Honorable William J. O'Neil, Judge

AFFIRMED

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T I M M E R , Judge

¶1 This appeal affords us a second opportunity to address disputes between the parties concerning an action to foreclose the right to redeem tax liens on a parcel of real property (the “Property”) formerly owned by Michael W. Hodges. Following remand for a new trial after the first appeal, Hodges redeemed the tax liens on the Property, and the trial court subsequently granted partial summary judgment in favor of Hodges and his successor-in-interest, David H. Cain. Norman and Cheryl Montgomery and Leveraged Land Company (collectively “LLC”) now appeal from that judgment and argue the trial court erred because (1) Hodges and Cain could not assert redemption as a defense on remand because Hodges did not have the ability to redeem at the time of the original trial, and (2) a disputed issue of material fact exists as to whether Hodges could properly redeem the tax liens on the Property. For the reasons set forth below, we affirm.

BACKGROUND

¶2 In 2005, LLC filed a complaint against Hodges and others¹ seeking to foreclose the right of redemption on tax liens LLC owned on the Property and to quiet title to the Property in LLC’s favor. After serving Hodges by publication, LLC obtained a default judgment against him. Hodges timely filed a motion to set aside the default judgment on the grounds of improper service and for a new trial pursuant to Rule 59(j),

¹Cain was not involved in the original proceedings, *see infra* ¶ 6, and the other parties are not part of this appeal.

Ariz. R. Civ. P. (“Rule”).² In support of his motion, Hodges submitted an affidavit from his attorney, Barry Becker, stating Becker was “presently holding \$11,000.00 in [his] trust account to be paid to the Pinal County Treasurer for redemption of the delinquent real property taxes.” The trial court denied the motion, and Hodges appealed.

¶3 On appeal, we affirmed the trial court’s denial of Hodges’s motion to set aside the judgment for improper service but reversed the court’s order with respect to Rule 59(j). *Leveraged Land Co. v. Hodges*, No. 2 CA-CV 2006-0210, ¶¶ 3, 19, (memorandum decision filed Aug. 8, 2007) (“*Hodges I*”). We found that Hodges was entitled to a new trial because he had demonstrated good cause through Becker’s uncontroverted affidavit that showed Hodges “was ready, willing, and able to redeem the tax liens.” *Id.* ¶ 15. Consequently, we remanded the matter to the trial court for additional proceedings. *Id.* ¶ 19.

¶4 On remand, over LLC’s objection, the trial court entered an order granting Hodges a new trial and restoring his right to redeem the tax liens. On March 19, 2008, Hodges filed a Notice of Redemption of Taxes and attached a tax receipt from the Pinal County Treasurer reflecting that on that day “BARRY BECKER PC FOR MICHAEL HODGES” had paid delinquent taxes totaling \$10,473.30 on the Property, thereby redeeming the tax liens.

²Rule 59(j)(1) provides: “When judgment has been rendered on service by publication, and the defendant has not appeared, a new trial may be granted upon application of the defendant for good cause shown by affidavit, made within one year after rendition of the judgment.”

¶5 On April 22, LLC filed a first-amended, two-count complaint seeking a judgment declaring as follows:

1. On the date of the entry of the original judgments foreclosing the right of redemption of the real property tax liens which are the subject of this action and quieting title in the real property which is the subject of this action in Leveraged Land, Hodges did not have a good faith defense to the action and thus Hodges has no right or claim in and to the property that is the subject of this action; and

2. On the date the certificates of purchase for the delinquent real property taxes which are the subject matter of this action were redeemed in the name of Hodges, Hodges did not have an interest in the real property that is the subject matter of this action sufficient to give him the statutory standing necessary in order to redeem the certificates of purchase for the delinquent real property taxes which are the subject matter of this action and thus the redemptions shall be set aside and declared null and void.

Alternatively, LLC sought to recover its attorney fees and costs in the event the redemptions were valid.

¶6 Cain then moved to intervene to protect his interest as Hodges's successor. He attached to the motion a special warranty deed dated March 14, 2008, that showed Hodges's conveyance of the Property to Cain. The trial court granted Cain's motion without opposition.

¶7 On September 15, Hodges and Cain moved for partial summary judgment on both counts of LLC's first-amended complaint. After briefing and oral argument, the

court granted partial summary judgment in favor of Hodges and Cain and certified its ruling as final pursuant to Rule 54(b), Ariz. R. Civ. P., LLC timely appealed.³

DISCUSSION

¶8 Before addressing the merits of the appeal, we consider our jurisdiction to do so. Appellees argue we lack jurisdiction because, in essence, LLC challenges the court's order granting Hodges a new trial and restoring his redemption right pursuant to this court's instructions in *Hodges I*. To support this contention, they rely on decisions holding that a judgment entered pursuant to an appellate court's specific direction is not appealable and is only reviewable by special action. *Tovrea v. Superior Court*, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966); *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 76, 601 P.2d 1357, 1360 (App. 1979). While we agree with this recitation of law, we disagree that it deprives us of jurisdiction. LLC has not attempted to appeal the order granting a new trial and restoring Hodges' redemption right. Additionally, the trial court did not enter the challenged partial summary judgment pursuant to this court's specific direction in the prior proceeding. Rather, the court entered it after additional proceedings, including the amendment of the complaint and the addition of other parties. Our jurisdiction to consider this appeal is not constrained by *Tovrea* and its progeny. We therefore turn to the merits of LLC's challenges.

³After entry of default judgment, the Pinal County Treasurer issued a treasurer's deed for the Property to LLC. On August 8, 2005, LLC sold the Property to third parties, who intervened in this lawsuit. The trial court eventually ruled that these third parties were not bona fide purchasers entitled to retain title to the Property. The propriety of that ruling is not before us.

¶9 We review the trial court's grant of partial summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). We view the facts and reasonable inferences therefrom in the light most favorable to LLC as the party against which summary judgment was entered. *Id.* ¶¶ 12-13. We will affirm the trial court's grant of partial summary judgment if the record before us reveals no genuine disputes as to any material fact and that Hodges and Cain, as the moving parties, are entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 308-09, 802 P.2d 1000, 1007-08 (1990). We will also affirm the grant of partial summary judgment if it is correct for any reason. *See City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

A. Count One

¶10 LLC argues the trial court erred as a matter of law by granting summary judgment on count one because, contrary to Becker's affidavit supporting the motion for new trial, Hodges admitted in his motion for partial summary judgment papers that he lacked the ability to redeem the tax liens at the time the court entered default judgment. According to LLC, our decision in *Hodges I* did not automatically reinstate Hodges's ability to redeem the tax liens. Rather, it required him to prove on remand that he had the ability to redeem the tax liens had he appeared in the lawsuit prior to entry of the default judgment. Because Hodges admitted he was unable to do so, LLC contends the court erred by ruling that Hodges's post-remand redemption constituted a sufficient defense to the foreclosure action. LLC further contends that permitting Hodges to redeem in the face of his admission that he lacked the funds to do so at the time of the original trial

would be inequitable, would cause “extraordinary disruption to subsequent real property conveyances,” and would lead to an absurd result. For the reasons that follow, we reject LLC’s contentions.

¶11 *Hodges I* did not require Hodges to demonstrate he had the ability to redeem the tax liens at the time the trial court entered the default judgment before he could redeem the tax liens after remand and successfully defend the foreclosure action. To support its position, LLC cites language from *Hodges I*, which states that in the absence of evidence that a Rule 59(j) affidavit is untrue, “[the defendant must] be permitted to offer evidence supporting the affidavit at a new trial.” *Hodges I*, No. 2 CA-CV 2006-0210, ¶¶ 12, 15, *quoting Sw. Metals Co. v. Snedaker*, 59 Ariz. 374, 391, 129 P.2d 314, 321 (1942). Although this language can be read to support LLC’s contention that on remand Hodges was required to prove he was ready, willing, and able to redeem the tax liens as set forth in Becker’s affidavit, and that LLC was entitled to probe that ability through discovery and trial, a fuller reading of *Southwest Metals* and *Hodges I* defeats LLC’s position.

¶12 In *Southwest Metals*, the defendant filed a motion seeking to vacate a judgment foreclosing a tax lien, attached an affidavit stating he was ready, willing, and able to redeem the liens, and deposited money with the clerk of the court in order to do so. 59 Ariz. at 380-81, 129 P.2d at 317. Among other things, the plaintiff argued that the defendant’s tender was insufficient to redeem the lien because he had failed to include the full amount due, and therefore the foreclosure judgment should remain intact. *Id.* at 390, 129 P.2d at 321. In rejecting this argument, the supreme court responded with the

language seized upon by LLC and quoted previously, *see supra* ¶ 10, but focused on the defendant's opportunity to demonstrate his ability to pay any additional taxes owing and mandated attorney's fees that had not yet been fixed by the court. *Id.* at 390-91, 129 P.2d at 321. The court did not require the defendant to prove he had the ability to redeem at any particular time in the past, including when the court had entered the default judgment. Indeed, the court clearly held that the defendant's right to redeem must be restored without further action in the face of his uncontested affidavit:

The affidavit and motion state that defendant is ready, able and willing to redeem. Unless it appeared that such affidavit was untrue, we think it was an abuse of discretion for the trial court to refuse to set aside the judgment foreclosing the tax lien in order that defendant might make redemption, which he would then have an absolute right to do under the law.

. . . .

. . . We think under all the circumstances the trial court abused its discretion in not setting aside the judgment and giving defendant the right to redeem the property in accordance with the statute.

Id. at 390, 392, 129 P.2d at 321, 322.

¶13 In *Hodges I*, we similarly refrained from placing a temporal requirement on Hodges's ability to redeem the tax liens. Specifically, we stated that "[u]nder *Southwest Metals*, the end result of a successful Rule 59(j) challenge is restoration of a defendant's right to redeem under what is now [A.R.S.] § 42-18206."⁴ *Hodges I*, No. 2 CA-CV 2006-

⁴Section 42-18206, A.R.S., provides in pertinent part:

Any person who is entitled to redeem . . . may redeem at any time before judgment is entered, notwithstanding that

0210, ¶ 18. Thus, on remand, Hodges’s right to redeem the tax liens was restored without the need to first prove he had the ability to redeem the liens at the time the court entered default judgment.

¶14 Applying the holdings of *Southwest Metals* and *Hodges I* to the present case, the trial court correctly concluded that Hodges was restored to the same legal position he would have occupied had he appeared in the lawsuit prior to the entry of default judgment—including having the right of redemption pursuant to A.R.S. § 42-18206 even if he lacked the ability to redeem at the time the court entered default judgment. *See also Nielson v. Patterson*, 204 Ariz. 530, ¶ 12, 65 P.3d 911, 914 (2003) (stating grant of new trial effectively vacates original judgment and places parties in position occupied before entry of judgment). Moreover, pursuant to the law-of-the case doctrine, the trial court was bound by our decision in *Hodges I* that Hodges’s redemption rights were restored. *Dancing Sunshines Lounge v. Indus. Comm’n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986) (explaining “the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested”).

an action has been commenced, but if the person who redeems has been served personally or by publication in the action, judgment shall be entered in favor of the plaintiff against the person for the costs incurred by the plaintiff, including a reasonable attorney fee to be determined by the court.

¶15 We are not persuaded to reach a different result by LLC’s citation to case law involving the grant of a new trial based on newly discovered evidence. In those cases, we reviewed the trial court’s ruling on a motion for a new trial filed pursuant to Rule 59(a)(4) and held that granting a new trial based on newly discovered evidence was appropriate if, among other things, the new evidence was in existence at the time of the original trial. *See, e.g., Wendling v. Sw. Sav. & Loan Ass’n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984). Cases discussing when a new trial should be ordered under Rule 59(a)(4) provide scant guidance in this appeal, however, as we already determined that a new trial was warranted pursuant to Rule 59(j) because Hodges was ready, willing, and able to redeem the tax liens even though Cain provided the funds to do so after entry of the default judgment. *Hodges I*, No. 2 CA-CV 2006-0210, ¶¶ 13-15. Regardless, we are not aware of any authority suggesting that parties granted a new trial pursuant to Rule 59(a)(4) are foreclosed from developing new theories or introducing new evidence not in existence at the time of the original judgment. Indeed, such authority would contradict the principle that when a judgment is vacated the parties are restored to the same position occupied prior to the entry of that judgment. *Nielson*, 204 Ariz. 530, ¶ 12, 65 P.3d at 914.

¶16 Finally, assuming equitable principles are pertinent to deciding issues relating to lien foreclosure and redemption, permitting redemption in this case would not result in injustice, as LLC asserts. LLC acquired its interest in the Property at a tax lien sale. As we have previously recognized, “[p]urchasing a tax lien entails risk and the onus is on the purchaser to protect its own interests.” *PLM Tax Certificate Program 1991-92*,

L.P. v. Schweikert, 216 Ariz. 47, ¶ 23, 162 P.3d 1267, 1271 (App. 2007) (citation omitted). Despite obtaining a default judgment to foreclose Hodges’s right of redemption, LLC knew the judgment obtained would remain vulnerable to a Rule 59(j) motion for a new trial for up to one year. Thus, the risk of disruptions to any subsequent conveyances of the foreclosed property fell squarely on LLC and its successors-in-interest. *See Lockwood v. Lockwood*, 19 Ariz. 215, 218-19, 168 P. 501, 503 (1917) (rejecting appellant’s claim of irreparable injury because despite being charged with knowing that the law permits appellee the right to cause the judgment to be vacated pursuant to former version of Rule 59(j), appellant “took his chance and lost”). Nevertheless, although the redemption deprived LLC’s successors-in-interest of title to the Property, the law permits LLC and/or its successors-in-interest to recover all expenditures, including reasonable attorney’s fees. *See* A.R.S. § 42-18206; A.R.S. § 42-18155(A) (“On demand of any person who is entitled to redemption money held by the county treasurer, the treasurer shall pay the money to that person on the surrender of the certificate of purchase or on the redemption of the registered certificate for the redeemed tax lien.”); *Sw. Metals*, 59 Ariz. at 391, 129 P.2d at 222 (“If redemption is made, plaintiff will receive all that he has expended . . .”). We therefore reject LLC’s argument.

¶17 In summary, the trial court did not err by granting summary judgment in favor of Hodges and Cain on count one of LLC’s first-amended complaint.

B. Count Two

¶18 Pursuant to A.R.S. § 42-18151, a person may redeem a real property tax lien if he is one of the following:

1. The owner.
2. The owner's agent, assignee or attorney.
3. Any person who has a legal or equitable claim in the property, including a certificate of purchase of a different date.

LLC argues the trial court erred by granting summary judgment on count two of the first-amended complaint because the pre-redemption date on the special warranty deed conveying the Property from Hodges to Cain, at a minimum, presents a question of fact as to Hodges's ownership of the property at the time he purportedly redeemed the tax liens. LLC contends that because Hodges conveyed the property to Cain prior to the date of redemption, Hodges was not entitled to redeem, and thus, the redemption should be set aside. We disagree.

¶19 “In Arizona, a deed to real property does not vest legal title in the grantee until it is delivered and accepted.” *Morelos v. Morelos*, 129 Ariz. 354, 356, 631 P.2d 136, 138 (App. 1981); *see also* A.R.S. § 33-401(A). The record before us unequivocally reflects that although the special warranty deed conveying the Property to Cain was dated March 14, 2008, it was not legally delivered to Cain until March 19, after Hodges redeemed the tax liens that same day. Specifically, Becker submitted an affidavit explaining the circumstances surrounding redemption of the tax liens and delivery of the special warranty deed:

5. As for the deed conveying the subject property from Michael W. Hodges to David H. Cain, Mr. Hodges executed that deed and sent it to my office. After Judge McCarville signed the order granting a new trial, I obtained a cashier's check from funds deposited in my trust account on September

7, 2005, for payment of the delinquent taxes and delivered the cashier's check to David H. Cain with written instructions to the County Treasurer to pay the delinquent taxes. At the same time, I handed Mr. Cain the deed from Mr. Hodges with instructions Cain could not record the deed until such time as the cashier's check I was handing to him had been delivered to the Pinal County Treasurer for redemption of the taxes. Once the taxes had been paid, he could consider the transaction between him and Mr. Hodges complete and he could record the deed.

Thus, because delivery of the deed to Cain and his acceptance was conditioned on payment of the tax liens, Hodges was the owner of the Property at the time of redemption. *Parker v. Gentry*, 62 Ariz. 115, 120, 154 P.2d 517, 519 (1944) (“[P]lacing a deed in the hands of a grantee does not constitute delivery where it is shown the intention of the parties was that it was not to become operative immediately”) (citation omitted); *see also Robinson v. Herring*, 75 Ariz. 166, 170, 253 P.2d 347, 349 (1953) (acknowledging ongoing viability of holding in *Parker*). Because no evidence contradicted Becker's recitation of events, no disputed issue existed concerning Hodges's status as owner of the Property at the time of redemption, and the trial court therefore properly entered summary judgment on count two.

CONCLUSION

¶20 For the foregoing reasons, we affirm. Hodges and Cain request an award of attorney fees pursuant to Arizona Rule of Civil Appellate Procedure (“ARCAP”) 25 as sanctions for a frivolous appeal. In the exercise of our discretion, we deny that request. We award Hodges and Cain, as the prevailing parties, their costs on appeal subject to their compliance with ARCAP 21.

Ann A. Scott Timmer, Judge*

Peter J. Eckerstrom, Presiding Judge

Joseph W. Howard, Judge

* The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in deciding this appeal pursuant to Ariz. Rev. Stat. § 12-120(E) (2003).